

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff,

v.

KARL F. THOMPSON, JR.,  
Defendant.

No. CR-09-88-FVS

ORDER DENYING THE  
DEFENDANT'S "MOTION FOR  
NEW TRIAL"

**THIS MATTER** comes before the Court based upon the defendant's "Motion for New Trial." He is represented by Carl J. Oreskovich and Courtney A. Garcea. The United States is represented by Joseph H. Harrington, Aine Ahmed, and Timothy M. Durkin.

**BACKGROUND**

The parties are familiar with the facts of this case. This order sets forth only those facts that are necessary for the resolution of the defendant's "Motion for New Trial."

**STANDARD**

The defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 33(a). Rule 33(a) states in pertinent part, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." A district court's authority to grant a motion for a new trial under Rule 33(a) is much broader than its authority to grant a motion for a judgment of

1 acquittal under Rule 29(c). *United States v. Alston*, 974 F.2d 1206,  
2 1211 (9th Cir.1992). In *Alston*, the Ninth Circuit explained:

3 The district court need not view the evidence in the light  
4 most favorable to the verdict; it may weigh the evidence and  
5 in so doing evaluate for itself the credibility of the  
6 witnesses. . . . If the court concludes that, despite the  
7 abstract sufficiency of the evidence to sustain the verdict,  
8 the evidence preponderates sufficiently heavily against the  
9 verdict that a serious miscarriage of justice may have  
10 occurred, it may set aside the verdict, grant a new trial,  
11 and submit the issues for determination by another jury.

12 *Id.* at 1211-12 (internal punctuation and citations omitted).

13 **WHETHER ALLOWING THE VERDICTS TO STAND WOULD WORK A SERIOUS**  
14 **MISCARRIAGE OF JUSTICE**

15 A. Count One

16 Count One alleged the defendant violated 18 U.S.C. § 242 by  
17 willfully depriving Otto Zehm of his Fourth Amendment right to be free  
18 from objectively unreasonable force. The United States had to prove  
19 four elements beyond a reasonable doubt: First, the defendant acted  
20 under color of law. Second, he deprived Mr. Zehm of his Fourth  
21 Amendment right to be free from objectively unreasonable force.  
22 Third, he acted willfully. Fourth, his conduct resulted in bodily  
23 injury to Mr. Zehm. In moving for a new trial, the defendant focuses  
24 upon the third element. He alleges the evidence preponderates heavily  
25 against the jury's determination he acted willfully. According to  
26 him, a serious miscarriage of justice will occur if the verdict on  
Count One is allowed to stand. He cites the following circumstances:

1 There was evidence indicating his actions served a legitimate law  
2 enforcement purpose. Grant Fredericks' analysis of the video  
3 recordings of the opening seconds of the confrontation is inconsistent  
4 with, and undermines, Dr. Richard Gill's analysis. The video  
5 recordings don't capture all of the confrontation; many important  
6 things occurred "off camera." Evidence indicating the defendant  
7 admitted striking Mr. Zehm in the head is unreliable, and there is no  
8 evidence the defendant gratuitously employed force against Mr. Zehm.

9 *Ruling:*

10 Presumably, the jury determined the defendant employed  
11 objectively unreasonable force during his struggle with Mr. Zehm. The  
12 jury's determination is supported by substantial evidence. Allowing  
13 it to stand does not pose a serious risk of injustice. Can the same  
14 be said of the jury's determination the defendant acted willfully? As  
15 he points out, the evidence of willfulness was not overwhelming. The  
16 jury could have found otherwise based upon the evidence that was  
17 presented to it. Nevertheless, the Court cannot say a serious  
18 miscarriage of justice will occur if the jury's finding of willfulness  
19 is allowed to stand.  
20

21 B. Count Two

22 Count Two alleged the defendant violated 18 U.S.C. § 1519 by  
23 knowingly making a false entry in a record and document with the  
24 intent to impede, obstruct, or influence an investigation of a matter  
25 within the jurisdiction of the Federal Bureau of Investigation  
26 ("FBI"). The United States had to prove two elements beyond a

1 reasonable doubt: First, the defendant knowingly made a false entry  
2 in a record or document. Second, the defendant did so with the intent  
3 to impede, obstruct, or influence the investigation of matter within  
4 the jurisdiction of the FBI. In moving for a new trial, the defendant  
5 focuses upon the first element. He alleges the evidence preponderates  
6 sufficiently heavily against the jury's determination he knowingly  
7 made a false entry in a record or document that a serious miscarriage  
8 of justice may have occurred. He cites the following circumstances:  
9 The video recordings are incomplete. They do not present Mr. Zehm's  
10 facial expressions. Some of the testimony of the percipient witnesses  
11 is consistent with his (the defendant's) account of the confrontation.  
12 Admittedly, some of his statements were inaccurate, but he was trying  
13 to remember and describe a complex series of actions that unfolded  
14 very rapidly under extremely stressful circumstance.

15 *Ruling:*

16 The defendant does not dispute his account of the confrontation  
17 is materially inconsistent with the video evidence and the  
18 observations of the percipient witnesses. Nevertheless, he maintains  
19 any inaccuracies in his account are attributable to faulty memory  
20 rather than to an intent to deceive. The jury did not accept his  
21 explanation.  
22

23 **WHETHER THE COURT IMPROPERLY ADMITTED EVIDENCE OF MR. ZEHRM'S**  
24 **INNOCENCE**

25 In rulings issued prior to, and during, the defendant's trial,  
26 the Court attempted to balance two competing interests. One interest

1 was the defendant's interest in having the jury determine whether his  
2 actions were objectively reasonable in light of the facts confronting  
3 him on March 18, 2006. The other interest was the United States'  
4 interest in testing the accuracy of his account of what occurred in  
5 the convenience store. At trial, the United States argued it should  
6 be allowed to present some evidence indicating Mr. Zehm had innocent  
7 reasons for being in the convenience store. Such evidence was  
8 necessary, said the United States, in order to rebut the suggestion  
9 Mr. Zehm had gone inside the store in order to hide from the police.  
10 The Court allowed the United States to present three pieces of  
11 evidence to which the defendant objected at trial and to which he  
12 continues to take exception: a convenience store employee testified  
13 he had seen Mr. Zehm purchase Pepsi numerous times at a different  
14 store; a police officer said she heard Mr. Zehm say, shortly before he  
15 stopped breathing, "All I wanted was a Snickers." Finally, a  
16 different police officer said Mr. Zehm had his paycheck in hand when  
17 the officer arrived.  
18

19 *Ruling:*

20 The defendant was entitled to have the jury determine whether his  
21 actions were objectively reasonable in light of the circumstances that  
22 confronted him on March 18, 2006. Evidence that Mr. Zehm had innocent  
23 reasons for being in the convenience store did not distract the jury  
24 from its task. The evidence gave the United States an opportunity to  
25 argue its theory of the case (*i.e.*, that Mr. Zehm neither defied the  
26 defendant nor threatened him) without depriving the defendant of an

1 opportunity to argue his theory of the case (*i.e.*, he reasonably  
2 thought Mr. Zehm posed an immediate risk of harm).

3 **WHETHER DELIBERATING JURORS CONSIDERED EXTRANEOUS PREJUDICIAL**  
4 **INFORMATION**

5 Shortly after the jury rendered its verdicts, the defendant's  
6 attorneys sought permission to interview the jurors in order to  
7 determine whether their deliberations had been influenced by  
8 extraneous prejudicial information. Counsel cited four categories of  
9 evidence that, in their opinion, indicated the deliberative process  
10 had been compromised. One category of evidence consisted of  
11 statements the presiding juror, Diane Riley, made to the news media  
12 after she learned the defendant's attorneys were challenging the  
13 jury's verdicts. The Court denied counsel's request to interview the  
14 jurors. In doing so, the Court analyzed some of Ms. Riley's  
15 statements to the news media. The Court concluded her statements did  
16 not indicate the jurors had been exposed to extraneous prejudicial  
17 information. Two or three months passed. An alternate juror  
18 encountered a Court Security Officer ("CSO") in Yakima, Washington.  
19 The alternate told the CSO other jurors had discussed the merits of  
20 the case while the parties were still presenting evidence. The  
21 alternate thought at least some jurors had made up their minds before  
22 deliberations began. Given the alternate juror's comments to the CSO,  
23 the Court interviewed the alternate and three jurors who participated  
24 in deliberations. The interviews did not produce evidence indicating  
25 that jurors made up their minds prior to deliberations or that, during  
26

1 deliberations, they considered extraneous prejudicial information.

2 *Ruling:*

3 The verdicts were not tainted by premature discussions among the  
4 jurors or by the jurors' consideration of extraneous prejudicial  
5 information.

6 **WHETHER THE COURT'S INSTRUCTIONS CONCERNING "WILLFULNESS" AND**  
7 **SELF-DEFENSE DEPRIVED THE DEFENDANT OF A FAIR TRIAL**

8 The defendant argues he was deprived of a fair trial by erroneous  
9 jury instructions. He cites both Instruction No. 12 (definition of  
10 "willfully") and Instruction No. 11 (self defense).

11 A. Definition of "Willfully"

12 Over the defendant's objection, the Court gave the following  
13 definition to the jury:

14 "Willfully" means that the defendant acted voluntarily  
15 and intentionally, with the intent not only to act with a  
16 bad or evil purpose, but specifically to act with the intent  
17 to deprive Otto Zehm of a right that is made definite by the  
18 Constitution.

19 To find that the defendant acted willfully, you must  
20 find that the defendant not only had a generally bad or evil  
21 purpose, but also that the defendant had the specific intent  
22 to deprive Mr. Zehm of his Fourth Amendment right to be free  
23 from objectively unreasonable force. This does not mean  
24 that the government must show that the defendant acted with  
25 knowledge of the particular provisions of the Fourth  
26 Amendment to the Constitution, or that the defendant was  
even thinking about the Fourth Amendment when he acted.

One may be said to act willfully if he acts in open  
defiance or in reckless disregard of a known and definite  
constitutional right -- in this case, the right to be free

1 from objectively unreasonable force. This specific intent  
2 to deprive another of a constitutional right need not be  
3 expressed; it may at times be reasonably inferred from the  
4 surrounding circumstances of the act. Thus, you may look at  
5 the defendant's words, experience, knowledge, acts and their  
6 results in order to decide the issue of willfulness.

7 If you find that the defendant had the purpose -- that  
8 is, the end at which his act was aimed -- to deprive Mr.  
9 Zehm of his Fourth Amendment right to be free from  
10 objectively unreasonable force, then the defendant acted  
11 willfully. By contrast, if you find the defendant acted  
12 through mistake, carelessness, or accident, then he did not  
13 act willfully.

14 (ECF No. 719.) The defendant argues the Court's "willfulness"  
15 instruction misstated the law as it has been established by the  
16 Supreme Court. According to the defendant, the United States had to  
17 prove he "had a general bad or evil purpose to act with the specific  
18 intent to either 1) knowingly depriving a person of their rights under  
19 the Constitution; or 2) acting in open defiance or reckless disregard  
20 of a person's rights." Defendant's Reply (ECF No. 1047) at 15. The  
21 defendant cites *Screws v. United States*, 325 U.S. 91, 104, 65 S.Ct.  
22 1031, 89 L.Ed. 1495 (1945), in support of his definition of the term  
23 "willfully." The defendant argues the Court's definition allowed the  
24 jury to believe it could conclude he acted willfully if it found he  
25 "acted 1) with a bad or evil purpose to deprive [Otto] Zehm of his  
26 constitutional rights or, 2) in open defiance or reckless disregard of  
this right, irrespective of his bad or evil intent." Defendant's  
Reply at 14.



1        *Ruling:*

2        Defining the term "willfully" is difficult because there are two  
3 ways in which a person's behavior may be considered willful. As the  
4 Eleventh Circuit observed recently, "A person acts 'willfully' for  
5 purposes of section 242 when he acts with 'a specific intent to  
6 deprive a person of a federal right made definite by decision or other  
7 rule of law,' or 'in open defiance or in reckless disregard of a  
8 constitutional requirement which has been made specific and  
9 definite.'" *United States v. House*, 684 F.3d 1173, 1199-1200 (11th  
10 Cir.2012) (quoting *Screws v. United States*, 325 U.S. 91, 103, 105, 65  
11 S.Ct. 1031, 1036-37, 89 L.Ed. 1495 (1945)). Ninth Circuit law is in  
12 accord. See, e.g., *United States v. Reese*, 2 F.3d 870, 881 (9th  
13 Cir.1993) (quoting the passage quoted by the Eleventh Circuit). The  
14 definition of the term "willfully" that the Court gave in this case --  
15 i.e., Instruction No. 12 -- set forth both ways in which a person's  
16 behavior may be considered willful. While Instruction No. 12 may not  
17 be a model of clarity, it is an accurate statement of the law.  
18

19        B. Self Defense

20        The other instruction the defendant objects to is Instruction No.  
21 11. It stated:

22        A person is entitled to defend himself against the immediate  
23 use of objectively unreasonable force by a police officer.  
24        However, the person may use no more force than appears  
25 reasonably necessary under the circumstances.

26        (ECF No. 719.) As the defendant points out, a person is entitled to  
defend himself if he is confronted with the immediate use of

1 objectively unreasonable force by a police officer. Here, the  
2 threshold issue was whether the defendant employed objectively  
3 unreasonable force. The jury would not have been permitted to  
4 consider self defense unless it first found the defendant employed  
5 objectively unreasonable force. However, in that case, it was  
6 unnecessary to consider self defense. Thus, in the defendant's  
7 opinion, the self defense instruction was superfluous and distracting.

8 *Ruling:*

9 There was substantial evidence Mr. Zehm physically resisted the  
10 officers. This instruction informed jurors his resistance was lawful  
11 as long he reasonably believed he was confronted with an immediate use  
12 of objectively unreasonable force by the officers. Had the Court not  
13 given this instruction, jurors might have wondered whether he broke  
14 the law simply by resisting the defendant and the other officers.

15 **WHETHER THE UNITED STATES ENGAGED IN PROSECUTORIAL MISCONDUCT**

16 The defendant alleges the United States engaged in two types of  
17 prosecutorial misconduct.  
18

19 A. Pretrial

20 The defendant alleges the United States intentionally withheld  
21 information that is favorable to him.

22 *Ruling:*

23 This allegation is addressed in a separate order.

24 B. Trial

25 The defendant alleges the United States deprived him of a fair  
26 trial by the following: (1) repeatedly asserting or implying, during

1 its opening statement and closing argument, that Mr. Zehm was innocent  
2 of wrongdoing at the ATM, and (2) during its closing argument, falsely  
3 stating Detective Ferguson recommended that country prosecutors  
4 refrain from filing a criminal charge against him (the defendant).

5 *Ruling:*

6 The statements and arguments to which the defendant objects may  
7 or may not have been improper, but they did not deprive him of a fair  
8 trial.

9 **IT IS HEREBY ORDERED:**

10 The defendant's "Motion for New Trial" (**ECF No. 818**) is **denied**.

11 **IT IS SO ORDERED.** The District Court Executive is hereby  
12 directed to enter this order and furnish copies to counsel.

13 **DATED** this 18th day of September, 2012.

14  
15 s/ Fred Van Sickle  
16 Fred Van Sickle  
17 Senior United States District Judge  
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